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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1992

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CONCRETE PIPE AND PRODUCTS
OF CALIFORNIA, INC.,
*Petitioner*,

v.

CONSTRUCTION LABORERS PENSION
TRUST FOR SOUTHERN CALIFORNIA
*Respondent.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

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## BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 89 national and international unions with a total membership of approximately 14,000,000 working men and women, files this brief *amicus curiae* with the consent of the parties, as provided for in the Rules of this Court.

## SUMMARY OF ARGUMENT

I. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), this Court ruled that as a general matter "the imposition of withdrawal liability [under the

Multiemployer Pension Plan Amendments Act] does not constitute a compensable taking under the Fifth Amendment." Each of the reasons given by the *Connolly* Court in support of that ruling is applicable here.

Petitioner's attempt to evade *Connolly* rests on a misapprehension of the statutory scheme. Petitioner, first of all, fails to recognize that, upon withdrawal, petitioner left behind a financial burden on the plan. And, in any event, petitioner's effort to measure a withdrawing employer's financial responsibilities to the plan by a *post hoc* calculation of the benefits due to the employer's employees —and to those employees alone—is contrary to the basic premises of multiemployer pension plans such as the plan here and of the legislation designed to protect the integrity of these plans.

In a multiemployer pension plan, the payment of benefits to the covered employees as a group becomes the responsibility *not* of each employer but of the plan. That being so, MPPAA defines an employer's obligation to contribute to a plan, such as the plan here, upon withdrawal on the same basis as the plan defines the employer's obligation to contribute as an ongoing participant. In this way, MPPAA spreads the cost of the unfunded vested liability of the plan over the class of employers who participated in creating that liability in the same manner that cost would here been spread had all of the participating employers seen the venture through. It may be that petitioner's employees will receive relatively little benefit from petitioner's participation in, and payments into, the plan compared to the benefits received by employes of other participating employers. But that is a possibility that is inherent in every pooling arrangement based, as here, on payments into a fund on one set of criteria and payments out of the fund on another set of criteria.

As long as petitioner was a party to the plan, petitioner received the labor market benefit that participation in the plan provides to all member employers: a pension program that constitutes a significant part of the compensation package for covered employees and that does so on an economically advantageous basis. Neither the Takings Clause nor the Due Process Clause prevents Congress from requiring petitioner to pay its fair share of the ongoing costs of the joint venture to which petitioner was a party.



II. A. MPPAA *does* provide for, and petitioner *has* availed itself of, access to impartial decisionmakers: a neutral arbitrator and a federal judge. Properly analyzed, petitioner's complaint is not addressed to the impartiality of the decisionmakers who passed on its legal challenge to the withdrawal liability the plan assessed, but to Congress' determination of the substantive standards and burdens of proof that those decisionmakers were to apply on that challenge.

Those substantive standards reflect a congressional judgment to preserve an area of discretion for plan trustees, and their actuaries, in choosing among reasonable alternatives with respect to a range of issues that are implicated by MPPAA's statutory scheme. Legal rules that incoroprate a standard of review that is deferential to decisions of private actors are an established means of implementing the public policy determination that in given instances preservation of the ability of private entities to exercise discretion is preferable to regulation by government fiat. The Constitution has never been held to require Congress or the courts to pretend to omniscience or to stultify all private initiative in order to extend the rule of law.

B. MPPAA's presumption in favor of the correctness of arbitral findings of fact is nothing more than the sound rule that, Congress having established arbitration as the preferred forum for finding facts, courts should defer to those findings rather than engage in the fact-finding process on a *de novo* basis.

## ARGUMENT

### I. PETITIONER'S TAKINGS CLAUSE CLAIM

(a) Petitioner argues that the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA"), as applied to petitioner in this case, violate the Fifth Amendment's restriction against government takings of private property without just compensation. The facts on which this "as applied" constitutional challenge is based can be summarized in a paragraph:

In 1976, petitioner purchased a plant and adopted the extant collective bargaining agreement covering the plant's employees. The collective bargaining agreement contained a provision requiring petitioner to make contributions to a multiemployer defined benefit pension plan —*viz.* a plan pooling the contributions of a number of employers to provide stated pension benefits to employees who attain eligibility by working a specified number of years for one or more employers participating in the plan.[1] In 1978—after the Pension Benefit Guaranty Corporation ("PBGC") had issued a report to Congress recommending the adoption of an amendment to the federal statutes regulating pension plans to provide that employers that withdraw from multiemployer pension plans be assessed a "withdrawal liability"[2]—petitioner agreed to a new collective bargaining agreement, continuing petitioner's participation in the plan. In 1980, MPPAA was enacted. The 1980 Act requires that employers that withdraw from a multiemployer pension plan pay their aliquot share of the plan's unfunded vested liabilities as of the time of the withdrawal. After the enactment of MPPAA, petitioner conducted only minimal operations involving employees covered by the plan. On December 15, 1981, petitioner withdrew from participation in the plan.[3] At the time of petitioner's withdrawal, none of petitioner's covered employees had sufficient service credits to entitle the employee to a vested pension under the plan's eligibility rules, but each of petitioner's covered employees had earned, in petitioner's employ, service credits toward a vested pension entitlement that the employee could carry over and build upon in employment with any other employer participating in the plan.[4] Petitioner has refused to pay the withdrawal liability required by MPPAA.

(b) In *Connolly v. Pension Benefit Guaranty Corp.*, *supra*, 475 U.S. at 255, this Court ruled that as a general matter "the imposition of withdrawal liability does *not* constitute a compensable taking under the Fifth Amendment." (Emphasis added.) Each of the reasons given by the *Connolly* Court in support of that ruling is applicable here.

As the *Connolly* Court pointed out, MPPAA's withdrawal liability provisions do no more than "safeguard[] the participants in multiemployer pension plans by requiring a withdrawing employer to fund *its share of the plan obligations incurred during its association with the plan.*" *Id.* at 225 (emphasis added). "The assessment of withdrawal liability is not made in a vacuum, . . . but directly

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[1] The plan at issue here is a "defined benefit plan," promising covered employees *a fixed and definite benefit*, rather than a "defined contribution plan" promising a benefit based upon the amount of contributions made to a participant's individual account. *See* 29 U.S.C. § 1002(35); *see also Nachman Corp. v. PBGC*, 446 U.S. 359, 363-64 n.5 (1980).

[2] *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 217 (1986).

[3] In arbitration, petitioner contended that it had withdrawn from the plan prior to the effective date of MPPAA. The Arbitrator rejected this argument and found that December 15, 1981, was the date of withdrawal. J.A. 216. The court below affirmed the Arbitrator's decision in this regard. This Court declined to grant certiorari to review this aspect of the decision below.

[4] *See* 29 U.S.C. §§ 1053(b)(1), 1060(a).

depends on the relationship between the employer and the plan to which it made contributions" (*id.*)—*viz.*, in essence, the withdrawing employer is required to pay the proportion of the plan's unfunded vested liabilities at the time of withdrawal that is equal to the proportion of the plan's contributions paid by the employer during the employer's participation in the plan.[5] The Court added that well prior to the enactment of MPPAA,

> [p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations. *See* [*PBGC v. R.A. Gray*, 467 U.S. 717, 732 (1984)]. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958). [475 at 227.]

(c) Petitioner contends that *Connolly* does not justify requiring an employer to pay any portion of a multiemployer plan's unfunded liabilities when that employer did not participate in the plan long enough for any of its employees to have obtained a vested right to pension benefits based solely on service with that employer. Petitioner's attempt to evade *Connolly* rests on a misapprehension of the statutory scheme.

At the outset, it should be understood that the fact that as of December 1981—when petitioner withdrew from the plan—none of petitioner's employees was yet vested does not entail the conclusion that petitioner's participation in the plan created no further financial burden to the plan. Petitioner's covered employees received service credits toward an entitlement to a pension under the plan for their time working for petitioner.

[5] This is the general rule under the presumptive method set forth in 29 U.S.C. § 1391(b), which was used in calculating petitioner's withdrawal liability in this case.



Those service credits are portable: in determining each of those employees' total years of credited service, the credit earned through employment with petitioner is combined with the credit earned through employment for other employers participating in the plan. *See, e.g.*, 29 U.S.C. § 1053(b)(1) ("In computing the period of service under the plan . . . all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account . . . ."). Thus, the time worked for petitioner increases the likelihood that petitioner's employees will acquire a vested right to pension benefits from the plan.

It is noteworthy, in this regard, that Congress was well aware of the prevalence of this type of pension portability when it enacted the withdrawal liability provision of MPPAA:

> Pension portability under a multiemployer plan means that a participant's benefit is based on service with all contributing employers for whom the participant has worked. This enables a participant who moves from one contributing employer to another, who might otherwise not be eligible for benefits based on service with any one employer, to receive a pension if his or her total service with all the contributing employers is sufficient to satisfy the plan's requirements for a vested benefit. This feature is particularly but not exclusively important in industries such as construction, water transportation, and the performing arts, which are characterized by mobility of employees, or employers, or rapid turnover, or both. [H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1, at 53 (1990)].

But petitioner's failure to recognize that it left behind a potential financial burden on the plan is only the first flaw in petitioner's analysis. For petitioner's effort to measure a withdrawing employer's financial responsibilities to the plan by a *post hoc* calculation of the benefits due to the employer's employees—and to those employees alone—is contrary to the basic premises of multiemployer

pension plans such as the plan here and of the legislation designed to protect the integrity of these plans.

A multiemployer pension plan is in effect a joint venture of participating employers in which the employers agree to pool the costs of providing pension benefits to their employees. This joint venture provides each participating employer the mechanism to provide—and to gain the labor market benefits of providing—a pension program for its own employees in a manner that allows each employer to spread the risks inherent in any insurance scheme over a larger group. Pensions for the covered employees become the responsibility not of each individual employer but of the plan.

Inherent in the multiemployer plan mechanism is the possibility that employer A may in effect bear some of the cost of providing pension benefits to employer B's employees, as well as the possibility that employer B may in effect bear some of the cost of providing pension benefits to employees of employer A, depending on such factors as the demographic composition of each employer's workforce, employee turnover and the like.

Employer contributions in a multiemployer plan are, moreover, generally geared to some measure of the work done by the employer's covered employees, not to the proportion of the employer's workforce that has attained or will attain a vested right to receive a pension.[6] As just noted, a small proportion of one employer's employees may become entitled to vested pensions while a high proportion of another employer's employees may attain that status. But the contribution responsibility of each employer is not affected by its employees' vesting rate: each employer continues to make an equal contribution based on the quantum of their employees' work.

Against this background, MPPAA defines an employer's obligation to contribute to the plan upon withdrawal

[6] In this case the measure is the number of hours worked by the employer's employees during the contribution period.



on the same basis as the plan defines the employer's obligation to contribute as an ongoing plan participant. Under MPPAA, the withdrawing employer's obligation is geared to the proportion of the plan's contributions paid by that employer during the employer's participation in the plan, not to the number of the employer's employees who have attained or may attain a vested right to pension benefits from the plan.[7]

In this way, MPPAA spreads the cost of the unfunded vested liability of the plan over the class of employers who participated in creating that liability in the same manner that cost would have been spread had all of the joint venturers seen the venture through. MPPAA's withdrawal liability is merely the application in a particular context of the general principle that governs the making of ongoing contributions in a multiemployer plan. Some withdrawing employers may leave behind a higher proportion of employees that have attained or will attain vested status than other withdrawing employers. But, withdrawal liability, measured as it is by the employer's *contribution* experience, rather than its employees' vesting experience, will not be affected by that difference. And, given the nature of the joint venture the employers undertook, that is exactly as it should be.

In sum petitioner on withdrawing from the plan has left behind a number of employees who have attained service credits toward a vested pension. The extent to which those service credits may result in pension obligations of the plan is presently not ascertainable. It may be that petitioner's employees will receive relatively little benefit from petitioner's participation in, and payments into, the plan compared to the benefits received by employees of other participating employers. But that is a

[7] In certain circumstances not applicable here, MPPAA authorizes use of an alternative method for allocating a plan's unfunded vested liabilities that links an employer's withdrawal liability to the benefits earned by its employees. *See* 29 U.S.C. § 1391(c)(4). *See* note 4, *supra*.

possibility that is inherent in every pooling arrangement based on payments into a fund on one set of criteria and payments out of the fund on another set of criteria.

At least of equal moment, whatever the benefit ultimately achieved by petitioner's employees, petitioner received precisely the benefit petitioner sought on entering the plan. As long as petitioner was party to the plan, petitioner received the labor market benefit that participation in the plan provides to all member employers: a pension program that constitutes a significant part of the compensation package for covered employees, and that does so in a manner that takes advantage of cost and risk sharing mechanisms for providing a contingent benefit. Petitioner having achieved that benefit, the Takings Clause does not prevent Congress from imposing on petitioner a fair share of the ongoing costs of the joint venture to which petitioner was a party. The *Connolly* Court's conclusion applies here with equal force:

> The purpose of forbidding uncompensated takings of private property for public use is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). We are far from persuaded that fairness and justice require the public, rather than the withdrawing employers and other parties to pension plan agreements, to shoulder the responsibility for rescuing plans that are in financial trouble. The employers in the present litigation voluntarily negotiated and maintained a pension plan which was determined to be within the strictures of ERISA . . . . Congress determined that unregulated withdrawals from multiemployer plans could endanger their financial vitality and deprive workers of the vested rights they were entitled to anticipate would be theirs upon retirement. For this reason Congress imposed withdrawal liability as one part of an overall statutory scheme to safeguard the solvency of private pension plans. We see no constitutionally compelled reason to require the Treasury to assume the financial burden of attaining this goal. [475 U.S. at 227-28.]



## II. PETITIONER'S SUBSTANTIVE DUE PROCESS CLAIM

What we have already said suffices to demonstrate that petitioner's substantive due process claim is without merit. Congress' determination that an employer's withdrawal liability should be based on the employer's proportionate share of all employer contributions to the plan over the period of the employer's participation in the plan is, to say the least, rational. Employers that agree to participate in a multiemployer plan normally agree—as is true here—to make contributions based on a measure of employee work done, not on employee benefits due; those contributions are used to fund benefits for *all covered employees*, not just for the contributing employer's own employees. As we have shown in Part I, Congress' decision that withdrawal liability should be calculated based on contribution share simply applies in the withdrawal context the principles that govern the ongoing contribution obligations of participating employers.

## III. PETITIONER'S PROCEDURAL DUE PROCESS CLAIM

Petitioner challenges three presumptions adopted in MPPAA that come into play in determining and measuring withdrawal liability. Petitioner argues that these presumptions deprive the withdrawing employer of the right to an impartial decisionmaker and thereby deprive the employer of procedural due process.

As we show, MPPAA *does* provide for, and petitioner *has* availed itself of, access to impartial decisionmakers: a neutral arbitrator and a federal judge. Properly analyzed, petitioner's complaint is not addressed to the impartiality of the decisionmakers who passed on its legal challenge to the withdrawal liability the plan assessed,

but to Congress' determination of the substantive standards and burdens of proof that those decisionmakers were to apply in passing on that challenge. That complaint simply has no merit.

The presumptions petitioners challenged are found in two subsections of MPPAA, 29 U.S.C. § 1401(a)(3), and § 1401(c). We address these subsections separately, in turn.

**A.**

Title 29 U.S.C. § 1401(a)(3) provides that:

> (A) For purposes of any proceeding under this section, any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous.
>
> (B) In the case of a determination of a plan's unfunded vested benefits for a plan year, the determination is presumed correct unless a party contesting the determination shows by a preponderance of evidence that—
>
> (i) the actuarial assumptions and methods used in the determination were, in the aggregate, unreasonable (taking into account the experience of the plan and reasonable expectations), or
>
> (ii) the plan's actuary made a significant error in applying the actuarial assumptions or methods.

1. Subsection 1401(a)(3)(A) (hereinafter "subsection (A)") thus provides that decisions of the plan sponsor—here the trustees of the plan—shall receive deference upon review by arbitrators or courts in two respects: as to decisions made on matters committed to the trustees' discretion, decisions of the trustees will only be set aside if found to be "unreasonable"—*viz.*, outside the zone of discretion granted to the trustees; as to factual determinations made by the trustees in the course of making decisions covered by this subsection, the trustees' factual determinations will be set aside only if "clearly erroneous."[8]



2. Public law rules that accord a measure of deference to decisions of private actors are an established feature of our legal system. Indeed, such rules are at the heart of the law of trusts. Both at equity and under ERISA, in a variety of circumstances, trustees are granted substantial deference in interpreting and administering their trusts. *See* Restatement (Second) Trusts § 187 (1959); *Bruch v. Firestone Tire & Rubber Co.*, 489 U.S. 101 (1989). The labor law and the law of corporations provide for analogous forms of deference to decisions of private entities. *E.g., Air Line Pilots Ass'n v. O'Neill*, 111 S. Ct. 1127, 1136 (1991) (decisions of labor organizations in negotiating and administering collective bargaining agreements are entitled to deference as long as the decisions are within a "wide range of reasonableness"); 3A W. Fletcher, Cyclopedia of the Law of Private Corporations § 1039 (rev. perm. ed. 1975) (decisions of corporate officers are entitled to deference as long as the decisions reflect "reasonable business judgment"); *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (same).

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[8] The lower federal courts have uniformly interpreted subsection (A) not to call for deference to decisions by trustees and arbitrators as to the meaning or application of federal law. *Chicago Truck Drivers Pension Fund v. L. Zahn Drug*, 890 F.2d 1405, 1411 (7th Cir. 1989); *Union Asphalts and Roadoils, Inc. v. MoKan Teamsters Pension Fund*, 857 F.2d 1230, 1233-34 (8th Cir. 1988); *Trustees of Amalgamated Ins. Fund v. Geltman Indus., Inc.*, 784 F.2d 926, 928-29 (9th Cir.), *cert. denied*, 479 U.S. 822 (1986); *Bd. of Trustees of Western Conf. of Teamsters Pension Fund v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1405-06 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985); *International Ass'n of Machinists National Pension Fund Benefit Plan C v. Stockton Tri Indus.*, 727 F.2d 1204, 1207 n.7 (D.C. Cir. 1984); *Republic Indus., Inc. v. Teamster Joint Council No. 83 of Va. Pension Fund*, 718 F.2d 628, 641 (4th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984).

As the foregoing examples show, lawmakers often determine that it is sound public policy to preserve the ability of a private entity to exercise a range of discretion in making decisions subject only to legal limitations at the margin. Legal rules that incorporate a deferential standard of review are a proven means of implementing that public policy determination. If Congress were denied the option of enacting such rules, the Legislature would be compelled to establish rules that specify the *precise* course of conduct the regulated entity must take in *every* given circumstance or to establish a general standard charging the courts (or arbitrators) to determine whether the entity has acted *precisely* as the judge (or arbitrator) believes that general standard requires in the circumstances at hand.

Very simply stated, the Constitution has never been held to require Congress or the courts to pretend to omniscience or to stultify all private initiative in order to extend the rule of law. So far as we are aware, there is no authority for the proposition that a putative claimant has a constitutional right to a cause of action that requires the regulated party to act in one particular way in each conceivable particular circumstance and no other and that assures that a judge or arbitrator will conduct a *de novo* review to determine whether the regulated party has done so. Yet, on analysis, it is just such a right that petitioner claims here.

3. Here Congress determined to preserve the ability of trustees, as fiduciaries bound to act in the best interest of their beneficiaries, to use their discretion in choosing among reasonable alternatives with respect to a range of issues that are implicated in MPPAA's statutory scheme. It is certainly rational, and probably wise, for Congress to conclude that trustees who have a working knowledge and familiarity with the circumstances of particular trusts—and, of necessity, with the industry in which the employers participating in the trust are engaged—are



better able to make decisions on an ongoing basis that properly fit those circumstances than the Legislative Branch, the federal judiciary or an outside arbitrator.

By the same taken, Congress could sensibly conclude that trustees, by reason of their specialized knowledge and expertise, are well suited to make the factual determinations that are integral to their withdrawal liability decisions. This conclusion is sufficient in itself to justify deference to the trustees' factual determinations. It is also very much to the point that if deference were not given to such factual determinations, every decision committed to the trustees' discretion would be subject to review of its factual premises on a *de novo* basis, and the practical effect of such review would be to impede the trustees' ability to carry out their proper role.

The limiting standards of "reasonableness" and "clearly erroneous" written into subsection (A) are, moveover, sufficient to prevent abuse by the trustees of their decisionmaking prerogatives. Other factors as well serve to prevent arbitrary or biased decisions by the trustees. MPPAA specifically requires that a plan's rules for determining withdrawal liability "operate and be applied uniformly with respect to each employer." 29 U.S.C. § 1394(b). The trustees thus cannot adopt *ad hoc* standards to meet a given case but must consider the long term impact of the rules adopted on the interests of the trust. In particular, the trustees of a multiemployer trust must consider the effect of rules respecting withdrawal liability on the willingness of employers to continue participating in the plan or of new employers to become party to the plan. Rules that may be advantageous in the short term but that would be seen as unduly onerous by such employers would not serve the long term interests in the plan. As the House Report on the bill which became MPPAA states:

> Plan fiduciaries are given a great deal of flexibility to strike a balance among the competing considera-

> tions of encouraging new entrants, discouraging withdrawals, easing administrative burdens, and protecting the financial soundness of a fund. The committee wishes to make it clear that in choosing the rules that would eliminate or reduce liability, the choice of such a rule is not *per se* a violation of fiduciary standards; the determination must be made as to whether the fiduciary has acted reasonably and in the interests of plan participants and beneficiaries and otherwise in accordance with the fiduciary standards. [H.R. Rep. No. 869, 96th Cong., 2d Sess. 67.]

And, as the Court of Appeals for the First Circuit has added:

> This commentary makes it clear that the trustees' role is not simply to find the highest value for withdrawal liability; they would not meet their fiduciary duty to the fund, for example if they set excessively high withdrawal liabilities which would have the effect of discouraging future participation. [*Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1142-43 (1st Cir. 1985).]

4. Much of what we have said to this juncture applies as well to the presumptions adopted in 29 U.S.C. § 1401 (a)(3)(B) (hereinafter "subsection (B)"). Subsection (B) requires deference to the trustees' determination of the plan's unfunded liabilities: the "actuarial assumptions and methods used in the determination" are presumed correct unless shown to be "unreasonable (taking into account the experience of the plan and reasonable expectations)"; the application of these assumptions and methods is presumed correct unless it is shown that "the Plan's actuary made a significant error" in that process.

The congressional reports accompanying the bill that became MPPAA explain that the presumptions in subsection (B) were created "to reduce the likelihood of dispute and delay over technical actuarial matters with respect to which there are often several equally 'correct



approaches.'" *Sen. Comm. on Labor and Human Resources, Section 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration*, 96th Cong., 2d Sess. 21 (1980) (*quoted in Keith Fulton & Sons v. New England Teamsters*, 762 F.2d 1137, 1143 n.7 (1st Cir. 1985)). Without these presumptions, Congress feared that plans might be "helpless to resist dilatory tactics by a withdrawing employer—tactics that could, and could be intended to, result in prohibitive collection costs to the plan." *Id. See also* H.R. Rep. 869, 96th Cong., 2d Sess., pt. 1, at 86 (1980). ("These rules are necessary in order to ensure the enforceability of employer liability. In the absence of these presumptions, employers could effectively nullify their obligation by refusing to pay and forcing the plan sponsor to prove every element involved in making an actuarial determination").

Here again, Congress chose not to dictate a "correct" choice of "assumptions and methods" but to permit trustees and their actuaries to choose from a range of reasonable alternatives, taking into account the particular experience of the plan. Implicit in this legislative choice is the recognition that, for example, actuaries who have knowledge of a plan's investment experience and investment options are better able to determine the investment return assumption than the drafters of federal legislation or reviewing courts or arbitrators. Without the presumption, courts and arbitrators would be placed in the position of making a *de novo* detemination of what assumption is "best" as to future investment returns. The Constitution does not compel Congress to place the courts and arbitrators in that position.

Moreover, here too, there are additional constraints on the determinations made by the plan and the plan actuaries. MPPAA requires trustees to adopt actuarial assumptions "which, in the aggregate, are reasonable . . . and which, in combination, offer the actuary's best esti-

mate of anticipated experience under the plan." 29 U.S.C. § 1393. Identical language appears in ERISA, 29 U.S.C. § 1082(c)(3), governing trustees' adoption of actuarial assumptions to be used in determining whether a plan has satisfied ERISA's minimum funding requirements. This scheme requires plan trustees to use a consistent set of actuarial assumptions for all purposes.[9] By so doing, MPPAA and ERISA significantly cabin the trustees' discretion:

> [T]he use of assumptions overly favorable to the fund in one context will tend to have off-setting unfavorable consequences in other contexts. For example, the use of assumptions (such as low interest rates) that would tend to increase the fund's unfunded vested liability for withdrawal liability purposes would also make it more difficult for the plan to meet the minimum funding requirements of [ERISA]. [*United Retail & Wholesale Employees v. Yahn & McDonnell*, 787 F.2d 128, 146-47 (3d Cir. 1986) (Seitz, J., dissenting in part) *aff'd by an equally divided court*, 481 U.S. 735 (1987).]

**B.**

The second subsection of MPPAA which petitioner challenges, 29 U.S.C. § 1401(c), provides:

> In any proceeding under subsection (b) of this section, there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct.

Congress determined that, in this context, arbitration is the preferred forum for making findings as to facts in dispute. As the District of Columbia Circuit stated in

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[9] H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 18 states: "The conferees intend that under this provision [section 1082(c)(3)] a single set of actuarial assumptions will be required for all purposes (e.g., for the minimum funding standard, reporting to the Department of Labor and to participants and beneficiaries, financial reporting to stockholders, etc.)".



*I.A.M. National Pension Fund Benefit Plan C v. Stockton Tri Indus., supra*, 727 F.2d at 1208 (footnote omitted):

> [In] establishing the arbitrative scheme, as in establishing an administrative agency, Congress has expressed a preference for initial resolution of the dispute in a non-judicial forum. . . . [A]n arbitrator skilled in pension and labor matters, like an agency in a given administrative area, is in theory likely to fashion superior resolutions of disputes within the arbitrator's area of expertise. [I]nitial resort to arbitration, like initial resort to an administrative tribunal, promotes judicial economy both because an arbitrator's decision may dispose of the dispute, and because even if one party appeals the arbitral decision, courts will have the benefit of the arbitrator's sifting of the facts. [*See also Chicago Truck Drivers Pension Fund v. L. Zahn Drug, supra*, 890 F.2d at 1410.]

Having decided that the facts should be determined in the arbitral process, Congress in § 1401(c) did no more than adopt a rule that courts should defer to the arbitrator's factual findings rather than engage in the fact-finding process on a *de novo* basis. In this context, that rule serves the legitimate objectives of the statute and in no way impinges on the right of a withdrawing employer to an impartial decisionmaker.[10]

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[10] Petitioner may also intend to challenge the allocation of the burden of proof in the two subsections at issue. Suffice it to say here that the allocation of the burden of proof established in these provisions works with the presumptions discussed in text to further the interests already described that Congress sought to serve in creating the procedures governing withdrawal liability. And, as this Court has stated:

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. . . . . However that may be, it is not for us to resolve the question of where the burden ought to lie on this issue. Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment. [*Lavine v. Milne*, 424 U.S. 577, 585 (1976).]

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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